Phileoallied Bank (M) Bhd v Sakuntalathevy d/o Manickavasagam

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3–21–830 OF 1998
MOHD HISHAMUDDIN J
9 SEPTEMBER 2004

Civil Procedure — Declaration — Application for — Whether a declaration order could be obtained by means of an interlocutory application — Whether appropriate procedure should be by way of an originating process

Land Law — Charge — Order for sale — Some 10 years after an order for sale, a fresh summons for directions was filed — Whether doctrine of laches and acquiescence applicable

An originating summons to enforce a charge was filed by the plaintiff/chargee on 28 March 1988. The plaintiff/chargee obtained an order for sale on 21 July 1989. The order for sale fixed 22 December 1989 as the date of the auction of the charged property. Thereafter, the plaintiff filed for summons for directions before the Registrar on 9 August 1989. However, for some reason, no auction was carried out on 22 December 1989. Even after 22 December 1989, again no auction was carried out, notwithstanding that a fresh summons for directions was filed by the plaintiff/chargee on 21 August 1990 and (pursuant to that summons for directions) a new auction date had been fixed: 10 January 1991. But, as it turned out, no auction took place on 10 January 1991 — or, at anytime thereafter. Then, after a very long lapse of time, that is to say some 10 years later, the plaintiff filed on 13 January 2001 a fresh summons for directions that is to say encl 18 to give effect to the order for sale. The defendant objected to the filing of this encl 18 and applied for various declarations, namely: (a) that the order dated 21 July 1989 is final and that this court is functus officio; or alternatively, that the time to execute the said order has lapsed pursuant to the Limitation Act 1953; or, alternatively, that the plaintiff is estopped from executing the said order. This application vide summons in chambers at encl 25 raises the question as to whether an order for a declaration can be obtained by means of an interlocutory application; or, whether the appropriate procedure should be by way of an originating process.

Held, dismissing the application with costs:

(1) Section 41 of the Specific Relief Act 1950 speaks of the institution of a suit to seek the court's discretion to make certain declarations. The phrase 'institute a suit means commencing a civil action; and one commences an action by way of an originating process, such as a writ or an originating summons: needless to say, one does not commence a civil action by way of a summons in

chambers. The case of *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 404 is irrelevant because at the High Court the issue as to whether a declaration could be sought merely by way of an interlocutory application was never at all raised. Likewise, the issue was also never raised before the Supreme Court (see paras 10–12).

(2) There is also the principle that the court will not grant a declaration to a litigant if an alternative remedy is available to him. In the present case, if from the defendant's standpoint there has been an unreasonable delay on the part of the plaintiff in filing the summons for directions to carry into effect the order for sale or that limitation had set in, she has an alternative remedy. All that she needs to do is to file a summons in chambers to set aside the order for sale pursuant to O 92 r 4 of the Rules of the High Court 1980 on the grounds that there has been an abuse of the process of court on the part of the plaintiff or to prevent injustice by reason of the unreasonable delay. There is no necessity to seek a declaration (see paras 14, 17).

(3) There is no question of recovering any proceeds of sale of land as yet. This is so for the simple reason that, at this stage of the proceeding, no sale of the charged land has in fact taken place pursuant to the sale order of 21 July 1989. In other words, there are no proceeds of sale as yet in existence to be recovered. The phrase 'to recover proceeds of the sale of land' means the proceeds of a sale (of a charged property) that has taken place pursuant to an order for sale, or the proceeds of a sale of immovable property pursuant to a sale (that has taken place) of the property by an assignee in the exercise of his right of sale under a loan agreement cum assignment. Needless to say that, in the present case, no sale of the charged land has ever taken place (see para 28).

(4) The doctrine of laches and acquiescence under s 32 of the Limitation Act 1953 cannot be used to prevent the carrying out of the auction in the present case. The plaintiff has explained the long delay in their affidavit. The reason as to why the plaintiff could not proceed with the auction was due to the fact that the plaintiff had to surrender the issue document of title to the Registrar of Titles pursuant to the direction of the Registrar of Titles, who had issued to the plaintiff a Form 1A Notice on 19 December 1989 under s 15 of the National Land Code 1965. The auction could not be carried without the issue document of title being deposited with the registrar of the court. The surrender of the title of the charged property was upon the request of the defendant herself: the defendant had applied to the land administrator for the subdivision of the said land immediately after or about the same time when the order of sale was made by the court. The plaintiff had no idea that the land administrator would have had taken ten years to effect the subdivision and were made available to the plaintiff only on 7 September 2000 (see para 30).

(5) In any event, the defendant by relying on the doctrine of laches and acquiescence is seeking equitable relief. Now it is a principle of equity that he (or she) who seeks equity must come with clean hands. But the defendant has not come to Court with clean hands. The defendant has failed to settle the outstanding amount due and secured under the charge. The defendant is also responsible for the delay in the auction proceeding by applying for subdivision

of the subject property and then making no effort to urge the land administrator to expedite the approval of her application for the subdivision of the charged land (see para 31).

[Bahasa Malaysia summary

Satu saman pemula untuk melaksanakan satu gadaian telah difailkan oleh plaintif/pemegang gadaian pada 28 Mac 1988. Plaintif/pemegang gadaian telah memperoleh satu perintah jualan pada 21 Julai 1989. Perintah jualan tersebut menetapkan 22 Disember 1989 sebagai tarikh lelongan hartanah gadaian tersebut. Selepas itu, plaintif telah memfailkan satu saman minta arahan sebelum Pendaftar pada 9 Ogos 1989. Akan tetapi, atas sebab-sebab yang lain, lelongan awam tidak dapat dijalankan pada 22 Disember 1989. Walaupun selepas 22 Disember 1989, atas sebab-sebab yang lain, tiada lelongan dijalankan, walaupun saman minta arahan yang baru difailkan oleh plaintif/pemegang gadaian pada 21 Ogos 1990 dan (mengikut saman-saman arahan tersebut) satu tarikh lelongan awam yang baru telah ditetapkan: 10 Januari 1991. Akan tetapi, tiada juga lelongan dijalankan pada 10 Januari 1991 — atau, pada sebarang masa selepas itu. Selepas itu, setelah masa yang amat panjang, iaitu lebih kurang 10 tahun selepas itu, plaintif telah memfailkan pada 13 Januari 2001 satu saman minta arahan yang baru iaitu kandungan 18 untuk memberi efek perintah jualan tersebut. Defendan membantah pemfailan kandungan 18 dan memohon untuk beberapa deklarasi, iaitu: (a) bahawa perintah bertarikh 21 Julai 1989 adalah yang muktamad dan Mahkamah ini telahpun functus officio; atau secara alternatif, bahawa masa untuk melaksanakan perintah tersebut telah luput mengikut Akta Had Masa 1950; atau, secara alternatif, bahawa plaintif diestop daripada melaksanakan perintah tersebut. Permohonan ini dibuat melalui saman-dalam-kamar di kandungan 25 membangkitkan soalan sama ada satu perintah untuk deklarasi dapat diperoleh melalui permohonan interlokutori; atau, sama ada prosedur yang wajar sepatutnya melalui proses pemula.

Diputuskan, menolak permohonan dengan kos:

(1) Seksyen 41 Akta Relief Spesifik 1950 menyebut tentang permulaan sesuatu tindakan untuk menuntut budi bicara mahkamah membuat deklarasi-deklarasi tertentu. Frasa 'institute a suit' maksudnya memulakan satu tindakan sivil; dan seseorang memulakan tindakan melalui proses saman, seperti satu writ atau satu saman pemula; bermaksud seseorang tidak memulakan satu tindakan sivil melalui saman dalam kamar. Kes *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 404 adalah tidak relevan oleh kerana pada peringkat Mahkamah Tinggi isu sama ada satu deklarasi dapat dituntut hanya melalui permohonan interlokutori tidak berbangkit langsung. Isu tersebut juga tidak berbangkit di Mahkamah Agung (lihat perenggan 10–12).

(2) Terdapat juga satu prinsip bahawa Mahkamah tidak akan memberikan satu deklarasi kepada litigan sekiranya terdapat remedi yang alternatif yang boleh dipakainya. Dalam kes ini, jika dari pandangan defendan, terdapat kelewatan yang tidak munasabah pada pihak plaintif dalam memfailkan saman minta arahan untuk melaksanakan perintah jualan tersebut atau terdapat pengehadan

yang telah pun bermula, beliau mempunyai remedi alternatif. Apa yang perlu dilakukannya ialah memfailkan saman-dalam-kamar untuk mengetepikan perintah jualan tersebut mengikut A 92 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980 atas alasan terdapat penyalahgunaan proses mahkamah di pihak plaintif atau untuk menghalang ketidakadilan di atas sebab kelewatan yang tidak munasabah. Tidak perlu untuk menuntut satu deklarasi (lihat perenggan 14, 17).

(3) Buat masa kini, tiada soal memperoleh semula sebarang hasil jualan. Ini adalah kerana, pada setakat prosiding ini, tiada jualan hartanah gadaian telah berlaku menurut perintah jualan 21 Julai 1989 tersebut. Dalam kata yang lain, masih tidak wujudnya hasil jualan yang dapat diperoleh. Frasa 'to recover proceeds of the sale of land' maksudnya hasil dari sesuatu jualan (hartanah gadaian) yang telah berlangsung mengikut perintah jualan tersebut, atau hasil dari jualan harta tak alih mengikut satu jualan (yang telah berlangsung) hartanah tersebut oleh seorang pemegang serahhak dalam melaksanakan haknya untuk menjual di bawah perjanjian pinjaman serta serahhak. Dengan itu, dalam kes ini, tiada jualan langsung atas hartanah gadaian tersebut pernah dijalankan (lihat perenggan 28).

(4) Doktrin kelewatan dan akuiesens di bawah s 32 Akta Had Masa tidak boleh digunakan untuk menghalang perlaksanaan lelongan tersebut dalam kes ini. Plaintif telah menjelaskan kelewatan yang panjang tersebut di dalam afidavit mereka. Alasan mengapa plaintif tidak dapat meneruskan dengan lelongan tersebut adalah berdasarkan fakta bahawa plaintif telah menyerahkan geran tanah yang dikeluarkan kepada Pendaftar Hakmilik mengikut arahan Pendaftar Hakmilik, yang telah mengeluarkan Notis Borang 1A kepada plaintif pada 19 Disember 1989 di bawah s 15 Kanun Tanah Negara. Lelongan tidak dapat dijalankan tanpa dokumen geran tanah didepositkan dahulu dengan Pendaftar di mahkamah. Serahan geran tanah hartanah gadaian tersebut adalah di atas permintaan defendan sendiri; defendan telah memohon kepada Pentadbir Tanah untuk pecah lot tanah tersebut selepas atau lebih kurang pada masa yang sama apabila perintah jualan tersebut dibuat oleh mahkamah. Plaintif langsung tidak tahu bahawa Pentadbir Tanah akan mengambil sepuluh tahun untuk memecahkan lot tanah tersebut dan hanya dapat diberikan kepada plaintif pada 7 September 2000 (lihat perenggan 30).

(5) Walau apa pun juga, defendan dengan berdasarkan doktrin kelewatan dan akuiesens menuntut relief ekuiti. Ia merupakan prinsip ekuiti bahawa seseorang yang menuntut ekuiti mestilah tidak bersalah. Akan tetapi defendan tidak ke mahkamah tanpa melakukan kesalahan. Defendan telah gagal menyelesaikan amaun tertunggak yang kena dibayar dan dijamin di bawah gadaian tersebut. Defendan juga bertanggungjawab atas kelewatan prosiding lelongan tersebut dengan memohon untuk memecahkan lot tanah hartanah tersebut dan tidak berusaha dalam mendapatkan Pentadbir Tanah mempercepatkan kebenaran permohonan beliau untuk memecahkan lot hartanah gadaian tersebut (lihat perenggan 31).]

Notes

For cases on application for declaration, see 2 *Mallal's Digest* (Consolidated Subject Index) paras 2052–2072.

A For cases on order for sale, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2255–2382.

Cases referred to

Chuah Eng Kong v Malayan Banking Bhd [1999] 2 CLJ 917 (refd)
B *Eshah binti Sa'at v Meriam binti Sa'at* [1975] 2 MLJ 97 (refd)
Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd [1991] 1 MLJ 404 (refd)
Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd [1991] 1 MLJ 221 (refd)
Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd [1984] 1 MLJ 266 (refd)
Perwira Affin Bank Bhd v Lim Weow [1998] 3 MLJ 56 (refd)
Sunsai Wansi Estate v Uni [1975] 1 MLJ 136 (refd)
C *United Malayan Banking Corporation v Yap Peng Wai @ Yap Peng Hooi* [1998] 5 MLJ 511 (refd)

Legislation referred to

Limitation Act 1953 ss 21, 32
D Limitation Act 1939 [UK] s 18
National Land Code 1965 ss 15, 256, Form 16D
Rules of the High Court 1980 O 92 r 4
Specific Relief Act 1950 s 41

SC Cheah (Lee Hishammuddin) for the plaintiff.
JS Naicker (Dhaliwal & Naicker) for the defendant.
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Mohd Hishamuddin J:

F **[1]** This application vide summons in chambers at encl 25 raises the question as to whether an order for a declaration can be obtained by means of an interlocutory application; or, whether the appropriate procedure should be by way of an originating process (such as a writ action or an originating summons).

G **[2]** By the aforesaid summons in chambers, the defendant applied for various declarations, namely:

(a) that the order dated 21 July 1989 is final and that this court is functus officio; or

(b) alternatively, that the time to execute the said order has lapsed pursuant to the Limitation Act 1953 ('the Act'); or
H

(c) alternatively, that the plaintiff is estopped from executing the said order.

[3] I shall begin by alluding briefly to the background facts of the case. The statutory Form 16D notice of the National Land Code 1965 ('the NLC') was
I served by the plaintiff/chargee on the defendant/chargor on 8 October 1987 pursuant to s 256 of the NLC. The defendant/chargor was given 14 days to comply with the demand made under the notice. As the defendant/chargor failed to satisfy the demand, the origination summons to enforce the charge was filed by the plaintiff/chargee on 28 March 1988. The plaintiff/chargee obtained before the judge the sale order on 21 July 1989. The order for sale fixed 22 December 1989 as the date

of the auction of the charged property. Thereafter, the plaintiff filed for summons for directions before the registrar on 9 August 1989. However, for some reason, no auction was carried out on 22 December 1989.

[4] What happened was, even after 22 December 1989, for some reason, no auction was carried out, notwithstanding that a fresh summons for directions was filed by the plaintiff/chargee on 21 August 1990 and (pursuant to that summons for directions) a new auction date had been fixed: 10 January 1991. But, as it turned out, no auction took place on 10 January 1991 or, at anytime thereafter.

[5] Then, after a very long lapse of time, that is to say some 10 years later, the plaintiff filed on 13 January 2001 a fresh summons for directions that is to say encl 18 to give effect to the order for sale. The defendant objected to the filing of this encl 18 — and hence the filing of the present encl 25 by the defendant.

[6] In my judgment, I accept the plaintiffs submission that the defendant's application via encl 25 should be dismissed with costs on the ground that, as the defendant is seeking an order for a declaration, the proper mode of proceedings ought to have been by way of an originating process, instead of by way of an interlocutory application (by summons in chambers), as was done in this case.

[7] I accept the following authorities submitted by the plaintiff as supporting the plaintiffs contention.

[8] In *Sunsai Wansi Estate v Uni* [1975] 1 MLJ 136, Eusoffe Abdoolcader J (as he then was) said:

> Of all the Rules of the High Court 1957 [the predecessor of the Rules of the High Court 1980], concerning declaratory relief, Order 25 rule 5 [now Order 15 rule 16 of the Rules of the High Court 1980] has the widest application as it provides that where a declaration is asked for, it may not be objected to on the ground that no consequential relief is or could be claimed. *It does not prescribe any special procedure, or is it limited to any specific matter. It applies to all proceedings for a declaration — whether instituted by writ or originating summons, and whether brought under a particular statute or under the general declaratory jurisdiction of the court. Where no special procedure is laid down, the claim for a declaratory judgment is brought by way of a writ. In certain cases, however, specified by legislation, a declaration may be sought on originating summons.* Proceedings in which the sole or principal question at issue is, or is likely to be, one of the construction of any written law or of any deed, will, contract, or other document, are appropriate to be taken by originating summons. This is specifically provided for by O 54A of the Rules of the High Court. The court may also make declarations by way of originating summons in matters relating to express trusts or the administration of the estates of deceased persons under the provisions of O 55 r 3 of the Rules of the High Court. (Emphasis added.)

[9] According to the *Supreme Court Practice*, Malaysian Edition, 1996, in its commentary on O 15 r 16, at paragraph 15/16/1:

> Scope of Rule —This Rule is taken from RSC (Rev) 1962, Order 15, rule 17, which had been taken verbatim from the former Order 25, rule 5, which was made in 1883.

A An action for a declaration may be begun by writ as well as by originating summons (see *Punton v Ministry of Pensions and National Insurance* [1963] 1 WLR 186, CA), and this rule should be read with Order 5, rule 4, supra, which has replaced and extended the operation of the former Order 54A (see *Re Staples* [1916] 1 Ch 322).

B **[10]** Section 41 of the Specific Relief Act 1953 speaks of the institution of a suit to seek the court's discretion to make certain declarations. The provision reads:

Discretion of court as to declaration of status or right.

41. Any person entitled to any legal character, or to any right as to any property, may *institute a suit* against any person denying or interested to deny, his title to the character or
C right, and the court may in its discretion make therein a declaration that he is so entitled, and he plaintiff need no'? in that suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so. (Emphasis added.)

D **[11]** In my opinion, the phrase 'institute a suit' means commencing a civil action; and one commences an action by way of an originating process, such as a writ or an originating summons: needless to say, one does not commence a civil action by way of a summons in chambers.

E **[12]** The defendant, on the other hand, relies on the Supreme Court case of *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 404. In this case, the High Court had granted an interlocutory application by the defendant for a declaration for vacant possessions prayed for by the purchasers. The High Court judgment (the High Court judgment is reported as *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 221) was upheld by the Supreme Court.
F In my view, *Hotel Ambassador* is irrelevant because at the High Court the issue as to whether a declaration could be sought merely by way of an interlocutory application was never at all raised. Likewise, the issue was also never raised before the Supreme Court. The issue that was raised before the Supreme Court was only as follows (at p 407 of the judgment of the Supreme Court):

G Secondly, it is also the appellants' contention that the learned judge had no jurisdiction to make the order of possession on an interlocutory application. It is said that such an order can only be made in a final judgment which means after a trial or by summary judgment or an order striking out the defence and entering judgment for the plaintiffs. In this case, it is not disputed that when the learned judge heard the application to set aside the
H restraining order the statement of defence had not even been filed.

[13] And at a later part of the judgment, the Supreme Court restated the issue as follows (at p 408):

I The next question is to consider whether the judge was correct in making.the order as he did in what appears to be an interlocutory proceeding when the statement of defence had not been filed.

[14] Assuming that I am wrong in my view above (that one cannot seek a declaration by way of an interlocutory application), and that the interlocutory

application for a declaration in the present case is procedurally and legally appropriate, still the question arises as to whether the defendant, under the circumstances of the case, is entitled to apply for a declaration. In the present case, I am not inclined to grant the declaration sought. There is the principle that the court will not grant a declaration to a litigant if an alternative remedy is available to him. In *Eshah binti Sa'at v Meriam binti Sa'at* [1975] 2 MLJ 97, Abdul Razak J said (at p 97):

> It is usual not to grant a declaration where there are alternative remedies availuole and adequate and had not been exhausted unless difficult and doubtful questions of law are involved.

[15] This principle is codified in the proviso to s 41 of the Specific Relief Act 1950. The proviso reads:

> Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.

[16] In my view, 'further relief in the above proviso means alternative remedies.

[17] In the present case, as I see it, if from the defendant's standpoint there has been an unreasonable delay on the part of the plaintiff in filing the summons for directions to carry into effect the order for sale (but I do not think so — I shall deal with this issue later) or that limitation had set in, she has an alternative (and a more expeditious) remedy. All that she needs to do is to file a summons in chambers to set aside the order for sale pursuant to O 92 r 4 of the Rules of the High Court 1980 on the grounds that there has been an abuse of the process of court on the part of the plaintiff or to prevent injustice by reason of the unreasonable delay. It is as simple as that. There is no necessity to seek a declaration.

[18] There is yet another reason why I should not grant the declaration sought. The defendant relies on s 21 of the Act and *United Malayan Banking Corporation v Yap Peng Wai @ Yap Peng Hooi* [1998] 5 MLJ 511 and contents that the plaintiffs summons for direction at encl 18 is time barred as it is filed only on 13 January 2001 that is to say more than 12 years from the date when the defendant failed to satisfy the demand for payment made by the plaintiff to the defendant (that is the service of Form 16D on the defendant).

[19] Section 21(1) of the Act provides:

> Limitation of actions to recover money secured by a mortgage or charge or to recover proceeds of the sale of land
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> 21. (1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on land or personal property or to enforce such mortgage or charge, or to recover proceeds of the sale of land or personal property after the expiration of twelve years from the date when the right to receive the money accrued.

[20] In my judgment, as the Form 16D notice was issued to the defendant on 8 October 1987 and that, upon the failure on the part of the defendant to satisfy the demand under the said notice (under the notice the defendant had 14 days to do so), the originating summons to enforce the charge was subsequently filed on 28 March 1988 (that is to say about five months later), the enforcement of the charge by the plaintiff, for the purpose of s 21(1) of the Act, was beyond dispute (indeed, this point is not disputed), well within 12 years from the date when the right to receive the money accrued, that is to say, upon the expiry of the 14 day period as stipulated by the Form 16D notice. The phrase 'the date when the right to receive the money accrued' appearing in s 21(1) was explained by Siti Norma Yaakob JCA (as she then was) in *Perwira Affin Bank Bhd v Lim Weow* [1998] 3 MLJ 56. The learned judge said:

> The right to receive money accrued in s 21(1) must refer to the time when the respondent defaulted in her obligation to make payment after being served with the Form 16E notice. Time then starts to run. Since the notice was served on the respondent on the same date it was issued, ie 2 November 1979, the respondent has one month from that date within which to make payment. That brings us to 2 December 1991.

[21] In the present case, under the Form 16D notice, the defendant had 14 days to settle the payment as demanded under the said notice. She had failed to do so. Thus the right to receive money accrued for the purpose of s 21(1) was upon the expiry of the 14-day period.

[22] The learned counsel for the defendant, however, submits that, for the purpose of s 21(1) of the Act, not only must the originating summons — filed to enforce the charge — be filed within 12 years from the date of the expiry of the 14-day period as stipulated under the form 16D (being the date of the right to received money accrued), the summons for directions before the Registrar (to carry into effect the judge's order for sale) must also be filed within the 12 year period. For it is the contention of learned counsel that the summons for directions at encl 18 is, for the purpose of s 21(1), 'an action to recover proceeds of the sale of land'.

[23] Before I proceed to deal this with this proposition, in order to understand better s 21(1), it is interesting and worthwhile to note that s 21(1) has its origin in s 18 of the UK Limitation Act 1939. This is as observed by Salleh Abas CJ (Malaya) (as he then was) in *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266. In delivering the judgment of the Federal Court, the learned Chief Justice said (at p 270):

> This section [s 21(1) of the Limitation Act 1953] practically is word for word identical with s 18 of the UK Limitation Act 1939 (*Halsbury's Statute* (3rd Ed) p 77).

[24] It is also worthwhile to note that the Federal Court, having made the above observation, then proceeded to interpret the phrase 'a mortgage or other charge on land' appearing in the provision. This is what the learned CJ (Malaya) said (at p 270):

> In our view the relevant words in s 21(1) of the Act for the purpose of this appeal are not merely the words 'other charge on land', but the whole expression 'a mortgage or other charge on land'. It is this expression we must now construe.
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> Our land law does not recognise a mortgage if it means a mortgage in the sense of English land law whereby the legal estate, ie ownership of the land is transferred to the mortgagee and what is left with the mortgagor is only an equitable right to redeem, known as equity of redemption. But our land law certainly recognises a mortgage in the sense of Torrens system, referred to by text written as Torrens Mortgage in which the mortgagor retains the legal ownership whilst the mortgagee acquires a statutory right to enforce his security. For the purpose of avoiding confusion, our National Land Code drops the word 'mortgage' and uses the word 'charge' in place of Torrens mortgage. Thus, when s 21(1) of our Limitation Act speaks of a 'mortgage', it must mean a 'charge' as understood and provided for in Part Sixteen of our National Land Code (see *Haji Abdul Rahman & Anor v Mahomed Hassan*) That being the case, the words 'other charge on land' in the section, in our view, must mean other types of encumbrances to which the land is subjected. These could be an equitable charge or a lien, statutory or equitable which arises as a result of depositing a title deed with the lender.

[25] Thus the Federal has interpreted the word 'mortgage' not to mean the mortgage as understood under English law (as I would have expected it to mean since s 21(1) was adopted word for word from the UK Limitation Act of 1939) but to mean the 'charge' as provided under the NLC; and the words 'other charge on land' to mean such encumbrances as an equitable charge or a lien. The above decision of the Federal Court was, however, on appeal, overturned by the Privy Council.

[26] Subsequently, some 15 years later the present Federal Court had in *Chuah Eng Kong v Malayan Banking Bhd* [1999] 2 CLJ 917 the occasion to interpret s 21(1) of the Limitation Act, in particular, the word 'mortgage'. The Federal Court now has a different interpretation of the word 'mortgage' in s 21(1). According to Peh Swee Chin FCJ (delivering the judgment of the Federal Court), the word 'mortgage' in s 21(1) means 'equitable mortgage'. The learned Federal Judge said (at p 929):

> The Court of Appeal used the words 'equitable mortgage' in relation to the security transaction without restraint and totally without any inhibition in the face of the National Land Code. We support such usage.
>
> Here, the said loan agreement, on a true construction, is an equitable mortgage but not an equitable charge, as there was no deposit of document of title with the lender as in *Arunasalam Chetty*...

[27] At a later part of the judgment, his Lordship said (at p 930):

> The three judges in *Arunasalam Chetty* had used the expression 'equitable mortgage' to the transaction of loan money secured by a deposit of title, a fortiori, the said loan agreement should be called an equitable mortgage on the facts. Thus s 21(1) of the Limitation Act 1953 provides 12 years in the case of mortgage land. The word 'mortgage' is used. Effect should be given to the intention of Parliament.

[28] Now, reverting to the facts of the present case, with respect, I am unable to subscribe to the proposition by learned counsel for the defendant that the

consequential summons for directions (encl 18) before the Court Registrar (pursuant to the order for sale by the judge) is an action to recover the proceeds of the sale of the subject land (ie the charged property). In my judgment, in the present case, there is no question of recovering any proceeds of sale of land as yet. This is so for the simple reason that, at this stage of the proceeding, no sale of the charged land has in fact taken place pursuant to the sale order of 21 July 1989. In other words, there are no proceeds of sale as yet in existence to be recovered. In my judgment, the phrase 'to recover proceeds of the sale of land' means the proceeds of a sale (of a charged property) that has taken place pursuant to an order for sale, or the proceeds of a sale of immovable property pursuant to a sale (that has taken place) of the property by an assignee in the exercise of his right of sale under a loan agreement cum assignment (referred to as an equitable mortgage in *Chuah Eng Kong*). Needless to say that, in the present case, no sale of the charged land has ever taken place.

[29] The defendant in the present case, as a further argument, has pleaded s 32 of the Act. The provision reads:

> Acquiescence
>
> 32. Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence, laches or otherwise.

[30] In my judgment, the doctrine of laches and acquiescence under s 32 of the Act cannot be used to prevent the carrying out of the auction in the present case. The plaintiff has explained the long delay in their affidavit. The reason as to why the plaintiff could not proceed with the auction was due to the fact that the plaintiff had to surrender the issue document of title to the Registrar of Titles pursuant to the direction of the Registrar of Titles, who had issued to the plaintiff a Form 1A Notice. This notice was issued to the plaintiff by the Registrar of Titles on 19 December 1989 under s 15 of the NLC. The auction could not be carried without the issue document of title being deposited with the Registrar of the Court (a requirement under the Court Registrar's directions pursuant to the summons for directions). The fact that the plaintiff had to surrender the issue document of title to the Registrar of Titles had nothing to do with the plaintiff. Instead, it had to with the defendant. The surrender of the title of the charged property was upon the request of the defendant herself: the defendant had applied to the land administrator for the subdivision of the said land immediately after or about the same time when the order of sale was made by the court. The plaintiff had no idea that the land administrator would have had taken ten years to effect the subdivision. The new subdivided land titles were only made available to the plaintiffs solicitors after the subdivisions were effected. They were made available to the plaintiff only on 7 September 2000. Thereafter, as we have noted, on 13 January 2001, the plaintiffs solicitors filed encl 18. I accept this explanation as reasonable. But even if the plaintiffs explanation is unsatisfactory, the defendant is not without blame. The defendant is also responsible for the delay. She was the one who had applied to the land administrator for the subdivision; and there is no evidence that she had taken reasonable efforts to urge the land administrator to expedite the approving process (so that the plaintiff could get the subdivided titles and proceed with the auction).

[31] In any event, the defendant by relying on the doctrine of laches and acquiescence is seeking equitable relief. Now, it is a principle of equity that he (or she) who seeks equity must come with clean hands. But the defendant has not come to court with clean hands. The defendant has failed to settle the outstanding amount due and secured under the charge. The defendant is also responsible for the delay in the auction proceeding by applying for subdivision of the subject property and then making no effort to urge the land administrator to expedite the approval of her application for the subdivision of the charged land.

Application dismissed with costs.

Reported by Sally Kee